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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO LOPEZ OCHOA,

Defendant and Appellant.

G029262

(Super. Ct. No. 00NF0674)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed as modified.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gary W. Brozio and Stacy A. Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

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THE COURT:*

A jury found Mario Lopez Ochoa guilty of one count of attempted rape, and one count of false imprisonment by violence. In sentencing him to prison, the court ordered him to serve the two counts concurrently.

FACTS

On February 29, 2002, Ochoa went to the Anaheim Lodge motel in Anaheim. He had stayed there before, and had talked with one of the maids on previous visits.

On this particular day, Ochoa telephoned the maid while she was cleaning one of the rooms and said he wanted to have sex with her. She hung up. He then met her in the hallway and found her eating Jell-O. He said he was sexually excited by watching her eat, and told her wanted to have sex. He pulled his penis out of his pants and appeared to start masturbating. The maid grabbed a broomstick and threatened him until he left.

A short while later, and while the maid was cleaning another room, Ochoa suddenly appeared behind her. He threw her on the bed, pinned down her arms, and climbed on top of her. He pushed up her shirt and fondled her breasts; he also fondled her buttocks and tried to pull down her panties. He told her he wanted to have sex with her like a “little doggie.” While struggling to get free, the maid cried out for help and told him to stop. Finally, she slipped out from under him and grabbed a steak knife she was carrying on her cart. She threatened to kill him, and Ochoa left in a hurry with the maid following close behind him.

I

Ochoa argues the evidence does not establish he assaulted the maid with the specific intent to commit rape. He claims he was merely responding to her flirtatious

* Before Sills, P. J., Rylaarsdam, J., and O’Leary, J.

behavior, and there is no evidence he used force to have sex because he let her slip out of his hands.

While we recognize the strict rituals of courtship are seldom followed today, the crude approach taken by Ochoa is unlawful. The evidence showed he threw her on the bed, pinned her arms down, attempted to disrobe her, and fondled her breasts and buttocks against her will. There can be no reasonable explanation for this conduct other than that he was using force for the purpose of attempting to engage in sexual intercourse with her. And the fact he stopped when she slipped away does not absolve him. (*People v. Davis* (1995) 10 Cal.4th 463, 509-510.) Moreover, the fact the maid may (or may not) have flirted with him at some point is not a justifiable reason for Ochoa to engage in this behavior. Indeed, to suggest that his actions were part of a legal act of seduction does violence to the term itself because seduction, by definition, involves enticement, not force.

Ochoa then argues there is no evidence he intended to rape, as opposed to sodomize, her. His argument is premised on the notion that because the prosecution limited its charging allegation to rape, the prosecution was obligated to prove beyond a reasonable doubt that he intended to rape her rather than commit some other form of sexual assault. But the evidence detailed above supports the jury's findings that he wanted to have vaginal intercourse.

Finally, Ochoa argues his new trial motion should have been granted because there was no substantial evidence he committed either crime. He focuses first on the court's failure to articulate reasons why the motion was denied, and then on the allegation no evidence supports the judgment. But nothing suggests the court improperly refused to weigh the evidence independently, or that it abused its discretion in denying the motion. (See *People v. Davis, supra*, 10 Cal.4th at p. 523.)

II

Ochoa claims the court erred in sentencing him concurrently on both counts. The Attorney General concedes the sentence violates Penal Code section 654 because, in the words of our Supreme Court, it would punish Ochoa twice “for an act made criminal by two or more provisions of the law.” (*People v. Allen* (2001) 21 Cal.4th 846, 851.)

We agree. The count for attempted rape and false imprisonment involve the same intent and objective, and thus the sentence must be modified.

DISPOSITION

The judgment is modified to reflect that count 2, false imprisonment by violence, is stayed pursuant to Penal Code section 654. As so modified, the judgment is affirmed. The clerk of the superior court is directed to correct the abstract of judgment and transmit a copy of the amended abstract to the Department of Corrections.